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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARLENE JACQUELINE BONJOUR,

Plaintiff and Appellant,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT

Defendant and Respondent.

B184456

(Los Angeles County  
Super. Ct. No. BC290585)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Soussan G. Bruguera, Judge. Affirmed.

Kirt J. Hopson for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt and

Christine T. Hoeffner for Defendant and Respondent.

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An employee who suffered both physical and psychological injuries sought workers' compensation for both. In the course of the evaluation of her workers' compensation claim with regard to her physical injuries, the employee was advised, by the employer's workers' compensation carrier, that no position was available to accommodate her work restrictions. The employer's carrier therefore offered the employee vocational rehabilitation, which the employee accepted.

The employee then filed suit for wrongful termination in violation of public policy, arguing that the notice from the employer's workers' compensation carrier was the functional equivalent of a termination of her employment on the basis of her physical disability. The trial court granted summary judgment for the employer. We affirm, concluding the insurer's notice of the availability of vocational rehabilitation services did not constitute a termination of plaintiff's employment.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

In January 1999, Marlene Bonjour began working at Bell High School ("Bell"), part of the Los Angeles Unified School District ("LAUSD"), as a Special Education Trainee. A Special Education Trainee "assists[s] teachers in caring for students' physical needs and in presenting educational material and developmental exercises . . . . " A Special Education Trainee "performs beginning-level work of gradually increasing responsibility in assisting in meeting the physical and educational needs of students in special education schools and classes." A Special Education Trainee does this work while learning the duties and responsibilities of a Special Education Assistant, the next step up. The duties of a Special Education Trainee

include “a variety of activities pertinent to training, physical care, disciplining, and tutoring, in order to inculcate habits, knowledge[ ], and skills in students with disabilities.” Among other tasks, a Special Education Trainee “[l]ifts students in and out of holding or locomotive devices and on and off buses.” A Special Education Trainee must also “[a]ssist[] students with all aspects of toileting which may include diapering, and lifting on and off the toilet, changing tables and mats.” A Special Education Trainee “[a]ssists teachers in directing activities and acts as play leader for assigned groups of students.” A Special Education Trainee receives supervision from a Supervising Special Education Assistant or a certificated administrator, and receives work direction from a teacher.

In the course of her employment at LAUSD, prior to her transfer to Bell, Bonjour sustained several orthopedic injuries to her neck, arms, back and hands. When Bonjour began at Bell, she was accommodated by not being required to lift anything greater than 15 to 20 pounds, due to a prior wrist injury.

On October 18, 1999, Bonjour obtained a note from her doctor, Eng Moy, M.D., indicating that she was under his care for “stress, severe headaches, and insomnia” and that Bonjour “must be off any supervision that might aggravate her stress.”<sup>1</sup> Bonjour gave the note to Bell’s principal, Melquiades Mares, Jr., who became concerned that

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<sup>1</sup> The note is ambiguous. In retrospect, it appears that Bonjour felt stressed because she believed that teachers at Bell were over-supervising her. The principal at Bell, however, interpreted the note to mean that Bonjour was stressed by her duties to supervise special needs children.

Bonjour was under too much stress to adequately perform her duties. Principal Mares contacted William Bierer, M.D., LAUSD's Medical Director, and requested Dr. Bierer perform an evaluation of Bonjour.

On the morning of October 21, 1999, Principal Mares asked Bonjour to step into his office. He informed Bonjour that he was sending her home until she could see Dr. Bierer. He placed her on paid leave. Bonjour left the room. Bonjour returned briefly, to accuse Principal Mares of having slammed the door on her fingers, a charge he denies. In any event, after Bonjour left the office, she went outside and sat in her car in the school's parking lot.

A few minutes later, Principal Mares received a telephone call from the California Highway Patrol, indicating that Bonjour called from her cellular phone stating that she was suicidal. Police and paramedics arrived and removed Bonjour from her car. The paramedics repeatedly asked Bonjour if she wanted to commit suicide. Bonjour responded only, "No comment." Bonjour was transported to College Hospital in Cerritos, where she was placed on a 72-hour hold.

On October 25, 1999, Dr. Moy prepared a second note, indicating that Bonjour was under his care for "worksite stress." The note stated Bonjour was "unable to be at work due to her stress. Needs to stay off work."<sup>2</sup>

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<sup>2</sup> At the time, Dr. Moy indicated Bonjour would be able to return to work on November 8, 1999.

On October 28, 1999, Bonjour filed a workers' compensation claim asserting *both* "worksite stress" and "right hand in door" injuries. Helmsman Management Services ("Helmsman") is LAUSD's workers' compensation claims administrator.

On November 4, 1999, Joel R. Sunkin, Ph.D., who had been Bonjour's treating psychologist for two weeks, prepared a note indicating Bonjour was psychologically able to return to work. However, he also stated, "I . . . believe that the supervision she has been under at her workplace is causing her unnecessary psychological stress." Bonjour did not immediately give this letter to LAUSD, apparently because Bell's school year was not in session during November and December.

In connection with her workers' compensation claim for stress, Bonjour was referred to Noel Lusting, M.D., Ph.D., for a psychological examination. Dr. Lustig examined Bonjour on November 29, 1999. He issued his report on December 15, 1999. Dr. Lustig concluded Bonjour was "not suitable for work as a special ed trainee." He concluded that she did not sustain a psychiatric disability due to employment, but rather had a serious characterological disorder. He concluded that she "should not be around children given her personality disorder, especially disabled children." Dr. Lustig noted Bonjour "misrepresented several issues which indicated that reality was not important to her." His other conclusions included "malingering" and "combination of borderline, histrionic, and narcissistic personality disorders." He further noted Bonjour has a "sense of entitlement and unreasonable expectations of favorable treatment." He opined that her characterological difficulties had not been exacerbated by work, that she had a history of similar problems, and that "she has a life long history of a need to feel

special.” Dr. Lustig concluded that Bonjour should have a fitness-for-duty examination in order to determine whether she should be allowed to return to work.

On January 12, 2000, Bonjour brought Dr. Sunkin’s November 4 “return to work” note to Dr. Bierer, at a meeting at which Bonjour’s union representative, Michael Ford, was also present. Given the results of Dr. Lustig’s intervening examination, Dr. Bierer suggested that, prior to returning her to work, Bonjour undergo a fitness-for-duty examination. He also requested three months of records from Dr. Sunkin verifying Bonjour’s stability to return to work. Bonjour and Ford agreed to the fitness-for-duty examination, and an appointment was made for January 14, 2000 with a psychiatrist, David N. Glaser, M.D. Ford also informed Dr. Bierer that Bonjour would release her records from Dr. Sunkin. But, subsequent to the meeting on January 12, Ford told Dr. Bierer that Bonjour had cancelled her fitness-for-duty examination on the advice of counsel. Dr. Sunkin’s treatment records were also never submitted to Dr. Bierer.

As Bonjour never submitted Dr. Sunkin’s records nor rescheduled her fitness-for-duty examination, Dr. Bierer did not approve Bonjour to return to work. On February 11, 2000, Bonjour’s illness pay ran out. Due to a miscommunication, termination proceedings were begun before the LAUSD Personnel Commission. The net result of the proceedings was that Bonjour was retroactively placed on paid involuntary leave through May 19, 2000. Thereafter, as her paid leave had been exhausted, she was placed on unpaid involuntary leave. Pursuant to her collective bargaining agreement, Bonjour would be granted a maximum of 18 months of unpaid

leave, which would run through November 20, 2001. The Personnel Commission also informed Bonjour that she “may not return to active working status without permission” from Dr. Bierer. She was directed to make an appointment with him. On December 28, 2000, Bonjour’s counsel wrote the Personnel Commission requesting that Bonjour be evaluated instead by a different mental health professional chosen by LAUSD. LAUSD agreed, and Bonjour was referred to Franklin Drucker, M.D., for a fitness-for-duty examination.

On January 15, 2001, Bonjour was evaluated by Dr. Drucker. Dr. Drucker issued his report on January 22, 2001. It states, “as far as I can determine, the appropriate psychiatric diagnosis is histrionic personality disorder.” He states, Bonjour’s “history and behavior reflect a significant personality disorder that has clearly caused her to have problems at her job and impaired successful functioning.” Dr. Drucker concluded that, “in view of her considerable emotional instability and other behaviors apparent to both Dr. Lustig and to this writer, I believe that Ms. Bonjour is unfit to resume employment as a special education trainee working with disabled youngsters. [¶] I anticipate that were she to resume her job, Ms. Bonjour would present personality conflicts and interpersonal difficulties ultimately warranting additional administrative action. Moreover, I am concerned lest her emotional instability adversely affect the disturbed students with whom she works and for whom she is responsible. She is unsuitable for this type of employment.” Bonjour was not returned to active duty. She did not seek a subsequent fitness-for-duty examination.

On November 20, 2001, Bonjour's involuntary unpaid illness leave ran out. She was therefore placed on a reemployment list for 39 months. Bonjour's workers' compensation claims continued.

LAUSD and Bonjour agreed that Bonjour would be evaluated by Robert J. Cooper, M.D., as an Agreed Medical Evaluator with respect to Bonjour's workers' compensation claim for worksite stress.<sup>3</sup> Dr. Cooper issued his report on December 5, 2001, after Bonjour's unpaid illness leave had terminated. Dr. Cooper found that Bonjour was characterized by at least one mental disorder, "depressive mood disorder," and that she was "already psychologically disturbed" prior to being sent home from work in October 1999. Dr. Cooper found Bonjour to be "characterized by an immature personality style with significant histrionic personality traits." He stated that she would have "difficulties with authority figures and supervision" and has "residual anger and limited frustration tolerance." He also stated that he would like to

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<sup>3</sup> On appeal, Bonjour argues that Dr. Cooper's evaluation is *dispositive* of the issue of whether she was capable of returning to work, because Dr. Cooper was an Agreed Medical Evaluator. It is apparent from the record that Dr. Cooper was an Agreed Medical Evaluator only in the context of Bonjour's workers' compensation claim; there was no stipulation that his opinion would be controlling in any subsequent wrongful termination action she might bring. In Bonjour's reply brief on appeal, she states that "Dr. Cooper's report had no connection to any 'workers' compensation appeal.'" If, by this, she means Dr. Cooper's report had no connection to any worker's compensation *proceeding*, the contention is foreclosed by Bonjour's response to LAUSD's separate statement of undisputed facts, in which Bonjour stated it was undisputed that she "was examined by [Dr. Cooper] as an Agreed Medical [Evaluation] with respect to [her] workers' compensation claim."

review all of the treating records from Dr. Sunkin.<sup>4</sup> Nonetheless, Dr. Cooper believed Bonjour's "depressive disorder will totally resolve after she returns to her work, and probably she will be able to return to her usual and customary job duties for [LAUSD] without difficulty."

On January 14, 2002, Bonjour was seen by Stephen Weiss, M.D., as an Agreed Medical Evaluator with respect to her worker's compensation claim for physical injuries. Dr. Weiss concluded that Bonjour was precluded from "very heavy work" due to a spine condition. He also concluded an injury to Bonjour's "right upper extremity" precluded her from "heavy lifting, repetitive gripping or twisting and from activities requiring repetitive finger dexterity with the dominant right upper extremity and no prolonged or repetitive overhead work." He concluded the "physical requirements of constant use of the right upper extremity and the lifting requirements . . . preclude her from returning to her pre-injury occupation." Dr. Weiss concluded Bonjour was capable of participating in vocational rehabilitation.

Helmsman sent LAUSD a form letter setting forth Dr. Weiss's restrictions and asking LAUSD to indicate whether the restrictions could be accommodated. On

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<sup>4</sup> Bonjour would subsequently testify at deposition that, from 1999 through 2001, she couldn't eat, was throwing up, wanted to hurt herself, and was very depressed. She attempted suicide on three occasions during this time period. She "felt like cutting [her] veins" for "two years, every day." Every time she saw Dr. Sunkin, she informed him of her feelings of wanting to kill herself. She told him of her first two suicide attempts, but did not tell him of the third, because she did not want to be hospitalized. Bonjour also testified that, because of her depression, there was never a time when she felt she could have gone back to work, even in a limited capacity.

February 27, LAUSD responded with a letter stating, “The listed restrictions for this employee involve many of the core duties required for this position; therefore the school cannot informally accommodate this employee or offer her another position. . . . [¶] If the employee wishes to request a formal Reasonable Accommodation, she should contact Mr. Leon Cazes, Coordinator, Personnel Services for the Disabled.”

A telephone number was given for Cazes.

On March 14, 2002, Helmsman sent Bonjour a “Notice of Potential Eligibility for Vocational Rehabilitation.” The notice indicates Bonjour “may be eligible for vocational rehabilitation benefits.” The notice states “Your employer:” and then has three possible check-boxes. The first states, “has a job for you that meets your work restrictions. You will be contacted with more information about this job soon.” The second states, “is attempting to identify a job that meets your work restrictions. You will be contacted within 30 days regarding the result of this search.” The third states, “does not have any modified or alternate work available within your work restrictions.” The third box is marked on the notice sent to Bonjour.<sup>5</sup> It does not appear that Bonjour was ever informed of the possibility of requesting a “formal Reasonable Accommodation,” although LAUSD had so informed Helmsman.

Bonjour interpreted the notice to be a termination of her employment. On July 2, 2002, Bonjour’s attorney filed a Notice of Claim Against Government Entity on behalf

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<sup>5</sup> The notice goes on to direct Bonjour to return a form if she is interested in vocational rehabilitation. Bonjour ultimately chose to do so.

of Bonjour, alleging that, on March 14, 2002, Bonjour was wrongfully terminated. The notice of claim indicates that: (1) Bonjour suffered physical injuries while employed by LAUSD; (2) Dr. Weiss concluded Bonjour's injuries placed certain limitations on Bonjour's physical abilities; (3) Helmsman, LAUSD's "agent," "notified [Bonjour] that no modified work was available with [LAUSD] to accommodate her work restrictions"; (4) LAUSD "has failed to, and refused to, perform a good faith search for all employment positions with [LAUSD] for which [Bonjour] is qualified both vocationally and medically. This failure and refusal by [LAUSD] was intentional, and, was done out of specific malice toward [Bonjour]." Noticeably absent from the notice of claim is any reference to Bonjour's stress-related issues.

On February 19, 2003, Bonjour filed her complaint against LAUSD, stating a single cause of action for wrongful termination in violation of public policy. Bonjour's complaint echoes her notice of government claim, alleging that LAUSD failed to conduct a review of its available employment positions to determine if Bonjour could be reasonably accommodated.<sup>6</sup> Aware that LAUSD did not actually fire her, Bonjour argued that the notice of the availability of vocational rehabilitation was the constructive equivalent of a termination.

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<sup>6</sup> Unlike her notice of government claim, Bonjour's complaint briefly references the psychological issues, stating only that Bonjour had been capable of returning to work since November 4, 1999 and that Dr. Cooper, the Agreed Medical Evaluator, believed she could return to work.

On March 11, 2005, LAUSD moved for summary judgment. LAUSD took the position that it had no duty to accommodate Bonjour's physical disabilities because her psychological disabilities rendered her unqualified for the job. Similarly, LAUSD argued that Bonjour's psychological disabilities posed a danger to the special education students with whom she worked.

Bonjour opposed, arguing that LAUSD failed in its duty to engage in a meaningful dialogue with her regarding her physical limitations, or notify her directly of the formal accommodation process. In response to LAUSD's arguments relating to her psychological disabilities, Bonjour argued that any such discussion was irrelevant, for the two reasons that: (1) Dr. Cooper had been agreed upon to *resolve* these issues and he had resolved them in favor of Bonjour; and (2) LAUSD "never based its decision to offer vocational rehabilitation services to [Bonjour]" on the basis of her psychological disabilities.

The trial court granted the motion on all theories, and entered judgment in favor of LAUSD. Bonjour filed a timely notice of appeal.

### ***ISSUE ON APPEAL***

A single issue resolves this appeal. Bonjour's complaint against LAUSD is based on the premise that the notice of eligibility for vocational rehabilitation, sent by Helmsman, constituted a notice of termination of her employment. We conclude that it did not. As such, it cannot constitute the basis for Bonjour's cause of action for wrongful termination in violation of public policy.

## ***DISCUSSION***

### ***1. Standard of Review***

“ ‘A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff’s asserted causes of action can prevail.’ (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) We exercise “an independent assessment of the correctness of the trial court’s ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.” (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *Helmsman's Notice of Eligibility for Vocational Rehabilitation Did Not Constitute A Termination*

While this case was pending on appeal, the California Supreme Court decided *Stephens v. County of Tulare* (2006) 38 Cal.4th 793. In *Stephens*, the court was concerned with Government Code section 31725, which provides that if the county board of retirement denies an employee a disability retirement on the basis that the employee is not permanently disabled,<sup>7</sup> and the employing county has previously “dismissed” the employee for disability, the employee is entitled to reinstatement. (*Stephens v. County of Tulare, supra*, 38 Cal.4th at p. 801.) At issue was the meaning of “dismissed” in the statute. The court concluded that “dismissed” has the same meaning as “terminated” or “released.” (*Id.* at p. 802.) The court determined the trial court’s conclusion that Stephens had not been dismissed was supported by substantial evidence. The court then added, “Stephens maintains he was dismissed by two [forms received from the county’s workers’ compensation claims administrator]; each had a box checked next to a statement indicating the county ‘[d]oes not have a job available within your work restrictions.’ That an insurance company can serve as proxy for the employer, such that a simple checked box can ‘dismiss’ an employee . . . seems doubtful.” (*Id.* at p. 809.)<sup>8</sup>

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<sup>7</sup> Government Code section 31725 applies only when all appeals of this determination are final.

<sup>8</sup> Following *Stephens*, in *Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, Division Seven of the Second Appellate District concluded that an employee is not “dismissed” within the meaning of Government Code section 31725 “when her local

Bonjour makes no argument that *Stephens* should be limited to the context of Government Code section 31725 cases and should not apply in the wrongful termination context.<sup>9</sup> Instead, she simply argues that employer actions *can be* the functional equivalent of a termination. We do not doubt the proposition. But we are concerned here not with *employer action*, but a form letter from a workers' compensation insurer. The workers' compensation insurer is not the employer's agent for purposes of employment status and cannot terminate an employee's employment by implication in a form letter.

This is particularly true in this case. It is clear from our lengthy recitation of the facts that, as far as LAUSD was concerned, Bonjour had never resolved the psychological issues that were the cause of her original placement on involuntary leave on October 21, 1999. Bonjour argues that LAUSD cannot rely on the psychological issues as a reason for not returning her to work because the psychological issues were

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government employer (1) advises her it currently has no available position to accommodate her work restrictions imposed following her industrial injury, (2) places the employee on unpaid industrial-injury leave, but (3) offers the employee vocational rehabilitation (including a vocational rehabilitation maintenance allowance) to train the employee for another position.” (*Id.* at p. 913.) The *Kelly* court suggests that if the county employer “had informed [the employee] of its inability to accommodate her permanent work restrictions and left it at that, without any indication of alternative employment, [the employee] would have a strong basis for asserting she had been functionally terminated on grounds of permanent disability.” (*Id.* at p. 924.) However, it must be remembered that the letter at issue in *Kelly* was a letter written by the employer, not a form with a check-box sent by the workers' compensation insurer.

<sup>9</sup> LAUSD raised *Stephens* in its respondent's brief; Bonjour addressed it in her reply.

not mentioned in the form letter from Helmsman which Bonjour is characterizing as a termination letter.<sup>10</sup> The argument proves that the letter from Helmsman *was not* a termination letter. Helmsman had asked LAUSD if LAUSD had any available work that met the physical work restrictions imposed by Dr. Weiss. LAUSD replied that it did not; LAUSD said nothing regarding whether it believed Bonjour was *otherwise* fit to work – it had not been asked. Helmsman then reported to Bonjour, by form letter, that she was eligible for vocational rehabilitation. Helmsman was not concerned with the continued existence of any employment relationship between Bonjour and LAUSD, or any other reasons as to why LAUSD might not deem Bonjour fit to be immediately returned to work.<sup>11</sup> It would work a substantial injustice to conclude that *LAUSD* cannot defend against a charge of wrongful termination with evidence of Bonjour’s psychological disorders simply because *Helmsman* did not mention the psychological disorders when checking a box informing Bonjour of her eligibility for vocational rehabilitation due to her physical injuries.<sup>12</sup>

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<sup>10</sup> Bonjour also argues that LAUSD cannot rely on the psychological issues because Dr. Cooper’s Agreed Medical Evaluation report is dispositive. The argument is meritless. An Agreed Medical Evaluation simply controls issues regarding the compensability of injuries in the context of a worker’s compensation claim (Lab. Code, §§ 4060, subd. (a), 4063); it is not binding in a wrongful termination litigation.

<sup>11</sup> Indeed, Helmsman’s form letter did not even inform Bonjour that she could formally request a reasonable accommodation, although LAUSD had so informed Helmsman. Helmsman simply checked a box which told Bonjour that she qualified for vocational rehabilitation.

<sup>12</sup> Moreover, Bonjour may have been terminated from employment long before receipt of Helmsman’s letter regarding her eligibility for vocational rehabilitation.

Helmsman did not have LAUSD's authority to inform Bonjour that she was terminated, and it did not do so. It simply informed Bonjour, in the course of her workers' compensation claim, that she was eligible for vocational rehabilitation services, and it checked a box indicating a reason why. If Bonjour was confused as to her employment status, it was her obligation to seek clarification.<sup>13</sup> (*Kelly v. County of Los Angeles, supra*, 141 Cal.App.4th at p. 922.) She cannot, on the basis of Helmsman's notice, simply assume that she had been terminated and bring suit against LAUSD.

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Bonjour was placed on paid leave until May 19, 2000, and was then on unpaid leave until November 21, 2001. At the time her unpaid leave was exhausted, she had failed her only fitness-for-duty examination and had not sought to return to duty. She was placed on a reemployment list for three years. As such, it appears that her employment was terminated on this date. If so, Bonjour's notice of government claim, filed July 2, 2002, was untimely. (Gov. Code, §§ 905, 911.2; see *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1319-1320.)

<sup>13</sup> If Bonjour had inquired directly of LAUSD, she likely would have learned of the availability of the formal reasonable accommodation process.

***DISPOSITION***

The judgment is affirmed. LAUSD shall recover its costs on appeal.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.